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Avoiding a Hard Brexit in Foreign Policy

Richard G. Whitman

The current public image of the Brexit process is of a British government negotiating with itself while simultaneously making little progress in Article 50 talks with the EU. It is perhaps inevitable that disputes over money, borders, citizens and a future trading relationship should overshadow other areas where the EU and UK could develop an effective post-Brexit partnership. Foreign, security and defence policy are areas where a departure from the existing intertwined relationship between the UK, the EU and the 27 other member states would have mutually detrimental effects.

The 13 October joint statement by German Chancellor Angela Merkel, French President Emmanuel Macron and UK Prime Minister Theresa May was a timely reminder of the shared security interests of the EU's member states and the UK. In response to US President Donald Trump's declaration that he would not seek congressional recertification of Iran's compliance with the Joint Comprehensive Plan of Action (JCPOA), the leaders of the EU's three largest member states together asserted that preserving nuclear diplomacy with Iran was a shared national-security interest. However, despite the shared interests and decades-long experience of EU–UK diplomatic cooperation, defence and security could be jeopardised by inflexibility in the design of the structures of the post-Brexit relationship.

Richard G. Whitman is Director of the Global Europe Centre, University of Kent, and an Associate Fellow of Chatham House.

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Defining a new partnership

In both her Lancaster House and Florence speeches, May has made clear that her government's objective is to replace the UK's EU membership with a 'deep and special partnership with the European Union'.[1] A considerable proportion of the Florence speech was devoted to 'a new relationship on security' alongside a new economic relationship. The prime minister's proposal, set out in the Florence speech, was that the security relationship would be underpinned by a treaty between the UK and the EU.

More detailed UK government ambitions for a broader foreign-policy, security and defence-policy relationship have been set out in two 'future partnership' papers, on 'Foreign policy, defence and development' and 'Security, law enforcement and criminal justice' respectively.[2] Both papers stress the degree to which the UK and EU share values, objectives and threat perceptions. The thrust of the papers is that the UK has much to lose in being more detached from the EU. Neither of these documents, however, nor the prime minister's proposal for a security treaty, have triggered detailed EU responses. The EU27 position has been to maintain a focus on the Article 50 process, interpreted in a sequential fashion, with discussions on a future relationship conditional on the delivery of the narrowly drawn mandate currently being pursued by the European Commission negotiator, Michel Barnier.

The UK government's aspiration to agree a treaty-based relationship on security is a serious declaration of intent. But the complex distribution of EU security policy, operating on the basis of different degrees of integration between the member states, pursued across different institutions (with differing roles for the European Commission, other EU agencies and member states) and based upon different EU treaty articles, throws up similar difficulties as negotiating a future trade relationship. For the UK to seek the closest possible relationship with the EU and its member states on internal security, and especially on issues of crime, terrorism and borders, will mean particularly acute negotiating challenges if the UK is outside the EU's institutions and legal order, and the jurisdiction of the European Court of Justice.

Moreover, because additional elements of the UK's external relations such as the environment, food security, energy and development policy

– all of which contain security dimensions – are all currently intertwined with EU policies, the scope of an EU–UK security treaty could be impressively broad.

Foreign and defence policy appear to present less formidable institutional and legal barriers than other areas of future EU–UK security collaboration. The EU's member states retain the pre-eminent role in foreign and defence cooperation. But the recent evolution of Brussels-based decision-making and implementation structures of the EU's Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP) present a 'docking problem' for a non-member state. Only member states are members of the EU's key foreign, security and defence decision-making bodies such as the Foreign Affairs Council and the Political and Security Committee (PSC).

Non-member states have been granted a range of formats

Non-member states have been granted a range of formats to share views and to facilitate collaboration on foreign-policy issues and security missions outside of these decision-making bodies. These include bilateral exchanges of views on foreign policy through dedicated 'political dialogue', security and defence dialogues or other gatherings with groups of non-member states in formats such as the PSC+9, and joint meetings between the PSC and NATO's North Atlantic Council. But none of these existing arrangements are likely to prove fully attractive to the UK as they do not allow for sufficient influence on EU policy formation (via direct participation in key institutions). They only allow for signing up to EU foreign-policy positions and security and defence operations after decisions on content, scope and action have already been determined. This is essentially participation and partnership on a 'take it or leave it' basis.

The position set out by May in her Florence speech envisages something rather different: 'it is vital', she said, 'that we work together to design new, dynamic arrangements that go beyond the existing arrangements that the EU has in this area – and draw on the legal models the EU has previously used to structure co-operation with external partners in other fields such as

trade'. In short, her government appears to seek a higher degree of integration with the EU than has been realised with other states to date.

Achieving such an ambitious goal depends on two key conditions: firstly, whether the EU's member states share the scale of ambition for a security agreement; secondly, and more crucially, whether the UK and the EU are able to achieve the exit agreement envisioned by Article 50 covering the UK's exit from the EU and terms for the negotiation of a post-membership relationship. 'No deal' on Article 50 means no immediate basis for designing a post-Brexit relationship in security policy.

On the British side, the security-treaty proposal is detached from any wider process of reflection on the objectives for the UK's foreign, security and defence policy post-Brexit. The phrase 'Global Britain' is being used by government ministers as shorthand for post-Brexit foreign policy but with little articulation of proposals for its ambition or the degree to which it diverges from current policy. Agreeing a security treaty with the EU would be a major foreign- and security-policy commitment. As Brexit was not anticipated, it is not currently reflected in the UK's National Security Strategy (NSS) or in the last Strategic Defence and Security Review (SDSR) completed in 2015. The scope and scale of the security commitments made to the EU via the security treaty, if as ambitious as the prime minister's Florence speech suggests, would need to be reflected in a future SDSR and NSS.

The current national-security capability review – essentially a mini SDSR – may reflect at least a tacit recognition of the consequences of Brexit for UK foreign and security policy. But London needs to conduct a broader evaluation of its post-Brexit foreign and security policy, especially in the European neighbourhood where the EU is a significant payer and player. How does the UK see itself fitting with existing EU policies? Does it seek a division of labour with the EU, or to outsource the delivery of policy objectives by aligning with existing EU policies? Are there other venues, such as the G7, the UN or NATO, where the UK could have more effective impact on EU policies than within an EU–UK structure? And how does the UK envision its future relationship with the EU if the remaining 27 member states seek closer security- and defence-policy integration – something that the UK has previously resisted?

Getting from here to there

One of the UK's most recent Brexit controversies is over the question of a transitional phase between the UK's formal departure from the EU under the terms of Article 50 on 31 March 2019 and the entry into force of a post-membership agreement to cover EU–UK relations. Beyond exiting the EU's institutions, the features of this transition are vague. Most commentators assume, however, that during a transition period the UK would remain within the EU's Customs Union and that, by implication, important aspects of the EU's external relations. This would imply that transition arrangements would also be in place covering foreign, security and defence policy. In this case, the EU would need to make a determination as to the degree to which it wished to see the UK continue to participate in EU policies as a 'privileged partner' and to provide the necessary legal and political arrangements in anticipation of a 'final status' EU–UK agreement. Such an arrangement can be dubbed a 'reverse Denmark': Denmark has an opt-out from CSDP (alongside that from single-currency membership), but otherwise participates as a normal EU member state. The UK, by contrast, would lose other parts of EU membership but preserve the security arrangements.

The features of transition are vague

An alternative for the EU during a transition period could be to 'lock out' the UK and to treat it as a non-privileged, non-member state associated with EU security, foreign and defence policies on similar terms as Norway. Unlike Norway, however, the UK is a non-Schengen state, and the relationship with the EU on internal security issues would depend most on what form of Europol and information-sharing collaboration was agreed to cover the transitional period. An operational agreement (allowing for personal data sharing) is already in place with non-Schengen, non-EU member states.

The alternative to reaching an agreement on a transition period is a 'cliff edge' or 'hard Brexit', with the UK leaving all EU institutions and policies when it leaves the EU at the end of March 2019. The implications for the UK of a hard Brexit would differ across foreign, security and defence policy.

The greatest immediate dislocating effect of a hard Brexit would be the loss of institutional and information-sharing arrangements facilitating cross-border security. Most notably, this includes the loss of information-sharing via the termination of access to data systems such as Schengen Information System (SIS) II and the DNA database and vehicle-registration sharing arrangements under the Prüm Convention, together with the termination of access to the use of the European Arrest Warrant (EAW). An abrupt departure from these arrangements could directly impact on UK counter-terrorism activities. A case frequently cited to illustrate the benefits of the existing arrangements is that of Hussain Osman, one of the failed 21 July 2005 bombers, who fled the UK and was extradited from Italy under an EAW, leading to his trial and conviction on terrorism charges.

In foreign policy, the UK would leave the formal structures of policy-making and lose direct access to information-sharing between EU member states. With no formal structures of foreign-policy consultation with the EU in place, the UK would fall back on informal information-gathering in Brussels and seeking influence via member-state capitals, which would likely require a greater investment of UK time and personnel. The use of sanctions as a foreign-policy instrument, to the extent that they are currently conducted through the EU, would face legal and operational challenges. The UK has been a leading player in defining and promoting the development of the EU's sanctions regimes. UK influence was significant in the sanctions imposed on Iran to counter its nuclear programme, and those in response to Russia's annexation of Crimea and the destabilisation of Ukraine. A loss of access to UK expertise on sanctions regimes would impinge significantly on the EU's policymaking.

In defence policy, the UK's contributions to the CSDP would likely cease, as the legal and political basis for their continuation would have ended. The degree to which this would have an impact on the EU would depend on the provision made for CSDP by the UK from spring 2019. The UK partnership paper suggests that the UK could remain linked to the CSDP by continuing contributions to CSDP missions and operations, including 'personnel, expertise, assets, or use of established UK national command and control facilities'.[3] In the absence of any agreement, however, UK person-

nel would likely be removed from CSDP operations in third countries, and from Brussels institutions such as the military committee. The operational headquarters at Northwood would no longer operate as a facility available to the EU, and the UK would leave the roster of EU battle groups. The UK would, however, remain connected to the CSDP through the EU–NATO Strategic Partnership and operational collaboration.

More generally, a hard Brexit would, of course, have implications for the UK's wider bilateral and trilateral relationships with the remaining EU member states, other European states and states outside Europe.

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Theresa May's ambition is for an EU–UK security treaty which establishes the UK's foreign, security and defence policy as separate, but not separable, from the EU. Such a wide-ranging security agreement is a formidable undertaking, and will be conditional on agreement on the future economic relationship. Meanwhile, the changed foreign, security and defence policy of an EU27 without the UK has been given no serious attention in Brussels or national capitals.

A less ambitious, but more attainable, goal may be to separate out the various strands of security, foreign policy and defence policy into separate agreements. This could be done under the umbrella of a more widely drawn strategic partnership. Consideration also needs to be given to the possibility of a hard Brexit, and the implications of dislocation replacing the existing embeddedness of the UK in the EU's foreign, security and defence policy. Although in other aspects of the negotiations the EU has been frustrated by the UK's lack of clarity, in this area it is for the EU, not the UK, to make specific proposals on future institutional arrangements. With the tight mandate and rigid negotiating approach currently being pursued in Brussels, it cannot be assumed that current shared foreign- and security-policy interests will be saved from the broader disruption of Brexit.

Notes

1 See Theresa May, 'The Government's Negotiating Objectives for Exiting the European Union', speech at Lancaster House, London, 17 January 2017, https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech; and Theresa May, 'A New Era of Cooperation and Partnership Between the UK and the EU', speech in Florence, 22 September 2017, https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu.

2 See Department for Exiting the European Union (DExEU), 'Foreign Policy, Defence and Development: A Future Partnership Paper', 12 September 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy__defence_and_development_paper.pdf; and Department for Exiting the European Union and Home Office, 'Security, Law Enforcement and Criminal Justice: A Future Partnership Paper', 18 September 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security__law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF.

3 DExEU, 'Foreign Policy, Defence and Development: A Future Partnership Paper', p. 19.